

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL W. DRAY,

Defendant-Appellant.

UNPUBLISHED
February 21, 2006

No. 257584
Wayne Circuit Court
LC No. 00-005117-01

Before: Donofrio, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for kidnapping, MCL 750.349. The trial court sentenced defendant to 30 to 60 years' imprisonment for the conviction. Because sufficient evidence existed for a reasonable trier of fact to convict defendant of kidnapping, any error in the instructions was harmless, and we affirm defendant's conviction. But because the trial court abused its discretion when sentencing defendant, we vacate defendant's sentence and remand for resentencing.

Defendant asserts that there was insufficient evidence to support his conviction for kidnapping. When reviewing a claim of insufficient evidence, this Court must view the evidence de novo, in the light most favorable to the prosecutor, and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). Questions of credibility and intent should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

"The elements of the offense of 'kidnapping' are not easily set forth in a short, simple statement." *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). "Michigan's kidnapping statute encompasses six forms of conduct, each of which constitutes the crime of kidnapping." *Id.*, at 296-297. In this case, based on the charges¹ and evidence presented, three

¹ Defendant's charge stated that he "did wilfully, maliciously, and without lawful authority, forcibly or secretly confine or imprisoned [sic] [the victim] within this state against his will, or forcibly carried or sent [the victim] out of this state against his will or caused [the victim] to be in any way held to service against his will."

of the forms of conduct that constitute kidnapping may be applicable: forcible confinement of another within this state; secret confinement of another within this state; and the forcible carrying away or sending of another out of this state. Consent, if not obtained by fraud or extorted by duress or by threat, is a complete defense to kidnapping. *People v LaPorte*, 103 Mich App 444, 448-449; 303 NW2d 222 (1981). The consent must be present throughout the commission of the entire transaction and initial consent does not necessarily exonerate defendant from all subsequent acts. *Id.*

To be guilty of secret confinement kidnapping, an accused must: (1) willfully, maliciously, and without legal authority, (2) secretly confine or imprison another person (3) by force or without consent. *Jaffray, supra* at 305. Defendant argues that even assuming he held the victim against his will, he did not secretly confine the victim because the victim admits that he talked with a number of people while he and defendant were together.

Prolonged secrecy is not always required to sustain the charge. “[I]t is enough that secrecy, or the attempt to maintain secrecy, denied the victim the opportunity to avail himself of outside help.” *Jaffray, supra* at 307. The proper focus is on the channels of communication available to the victim. *Id.* In this case, the victim was a legally incapacitated individual who was off his medication and away from everyone he knew. According to the victim, defendant had the telephone number of the victim’s mother, but he refused to let the victim have it. While the victim had a chance to speak to other people he may not have been able to communicate his predicament. Viewing the evidence in a light most favorable to the prosecution, we conclude that the prosecution presented sufficient evidence to support the finding that defendant denied the victim the opportunity to avail himself of outside help. We therefore also conclude that sufficient evidence was presented to support the finding that defendant secretly confined the victim.

Defendant also argues that the victim consented to the trip. The evidence in this case, mostly the victim’s testimony, is unclear on whether the victim consented to the trip. Defendant and the victim were friends and, at times, the victim testified that he did not want defendant to release him and that he got angry with defendant when defendant said he wanted to take him home. He also stated that he wanted to stay out awhile with defendant and that defendant bought him clothes because they knew the victim was going to be away from home for a long time. On the other hand, the victim testified that defendant would not take him home and that they always fought. He also testified that defendant would not let him see his mother’s telephone number. The victim further testified that “[defendant] wouldn’t take me home. He wouldn’t take me home,” and defendant promised him they would be right back after they first left.

To be a valid defense, consent must be present throughout the commission of the entire transaction and initial consent does not necessarily exonerate defendant from all subsequent acts. *LaPorte, supra* at 448-449. Even if the victim’s testimony suggests that he consented to the trip at times, it also suggests that the consent was not present at all times. Viewing that evidence in a light most favorable to the prosecution, we conclude that the prosecution presented sufficient evidence to support the finding that there was no consent.

Forcible confinement kidnapping requires that the prosecution prove four elements beyond a reasonable doubt: (1) a forcible confinement of another within this state, (2) done willfully, maliciously, and without legal authority, (3) against the will of the person confined or

imprisoned, and (4) asportation of the victim that is not merely incidental to an underlying crime. *People v Vaughn*, 447 Mich 217, 224 n 1; 524 NW2d 217 (1994), overruled in part on other grounds *People v Carines*, 460 Mich 750, 766; 597 NW2d 130 (1999). In this case, defendant argues that he never forcibly confined the victim. As discussed above, the victim's testimony suggests at times that he went with defendant willingly. However, it also suggests that defendant used force to make him go with defendant at other times. The victim testified that he and defendant always fought. He also told the police that he had been raped by defendant. When the victim's mother came to get the victim, he was incontinent and in diapers. The victim also testified that defendant refused to take him home or to let him see his mother's telephone number. Viewing that evidence in a light most favorable to the prosecution, we conclude that the prosecution presented sufficient evidence to support the finding that defendant forcibly confined the victim.

The third form of kidnapping of which defendant may be guilty is the forcible carrying or sending away of another out of this state. This conduct does not require a showing a specific intent, but it must be done willfully, maliciously, and without legal authority. *Jaffray, supra* at 297-298. It does require asportation of the victim. *Id.*, at 298. Defendant argues that he never forcibly carried the victim out of state. The victim clearly left the state and, based on the evidence discussed above, we conclude that, when viewing the evidence in a light most favorable to the prosecution, the prosecution presented sufficient evidence to support a finding that defendant forcibly carried the victim out of this state.

Defendant's second issue on appeal is that the trial court erred when it instructed the jury regarding secret confinement. "Claims of instructional error are subject to review de novo." *People v Hernandez-Garcia*, 266 Mich App 416, 417; 701 NW2d 191 (2005). The trial court must instruct the jury regarding the applicable law and fully and fairly present the case in an understandable manner. *Id.*, at 417-418.

The trial court's jury instructions regarding secret confinement were incorrect. In secret confinement cases, the proper focus is on the channels of communication available to victim. *Jaffray, supra* at 307. It is enough that secrecy, or the attempt to maintain secrecy, denied the victim the opportunity to avail himself of outside help. *Id.* The trial court, however, limited the question to whether the victim's location was kept secret from his mother. By doing so, it did not fairly present the case and we conclude that the trial court erred when it instructed the jury.

An error in the instruction of the elements of a crime is an error of constitutional magnitude. *Carines, supra* at 761. Constitutional errors must be classified as either structural or nonstructural. *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000). "If the error is structural, reversal is automatic." *Id.* Preserved constitutional errors that do not constitute structural defects do not automatically require reversal. *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994). Rather, they are reviewed to determine if the error was harmless beyond a reasonable doubt. *Id.*

An instructional error regarding one element of a crime, whether by an incorrect description or by omission, is nonstructural and subject to a harmless error analysis. *Duncan, supra* at 51. The question before this Court on harmless error review is whether, absent the error, "honest fair-minded jurors might very well have brought in not-guilty verdicts." *People v Whitehead*, 238 Mich App 1, 9; 604 NW2d 737 (1999). Properly admitted evidence must be

quantitatively assessed to determine whether, had there been no error, there is a reasonable possibility that the fact-finder would have acquitted. *Id.*

In this case, the error in jury instructions was harmless because, if properly instructed, the jury would have convicted defendant. In addition to erring in its explanation of secret confinement, the trial court incorrectly identified the elements of kidnapping. As discussed above, the Michigan kidnapping actually encompasses six forms of conduct, each of which constitutes kidnapping. *Jaffray, supra* at 296-297. The trial court's instructions, however, blended the forms of conduct together and added elements of each. Two forms of kidnapping applicable to this case do not require that the prosecution prove secret confinement. As discussed above, sufficient evidence was presented to convict defendant of those two forms of kidnapping regardless of whether there was any secret confinement. We, therefore, conclude that any instructional error regarding secret confinement was harmless beyond a reasonable doubt and no miscarriage of justice resulted from the error.

Moreover, if properly instructed, the jury would have found that there was secret confinement. It is enough that secrecy, or the attempt to maintain secrecy, denied the victim the opportunity to avail himself of outside help. *Jaffray, supra* at 307. As discussed above, defendant denied the victim the opportunity to avail himself of outside help by keeping him off his medication, removing him from his support system, and withholding from him his mother's telephone number. Without those things, the victim was unable to communicate effectively if at all and, therefore, was unable to seek help even if there were people around.

Defendant's third issue on appeal is that his sentence violates that the principle of proportionality. Following the enactment of the sentencing guidelines, the trial court is required to choose a sentence within the guidelines range, unless there is a "substantial and compelling" reason for departing from this range. *People v Babcock*, 469 Mich 247, 255-256; 666 NW2d 231 (2003). A "substantial and compelling reason" must be construed to mean an "objective and verifiable" reason that "'keenly' or 'irresistibly' grab[s] our attention," is "of 'considerable worth' in deciding the length of a sentence," and "exist[s] only in exceptional cases." *Babcock, supra* at 257-258, quoting *People v Fields*, 448 Mich 58, 67-68; 528 NW2d 176 (1995).

The existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. The determination that a particular factor is objective and verifiable should be reviewed by the appellate court de novo as a matter of law. "A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion." *Babcock, supra* at 264-265.

For purposes of reviewing sentencing departures, the abuse of discretion standard of review must be one that is more deferential than de novo, but less deferential than the usual abuse of discretion standard. "At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. An abuse of discretion occurs, however,

when the trial court chooses an outcome falling outside this principled range of outcomes.” *Babcock, supra* at 269 (internal citations omitted).

Accordingly, the Court of Appeals must determine, upon a review of the record, whether the trial court had a substantial and compelling reason to depart from the guidelines, recognizing that the trial court was in the better position to make such a determination and giving this determination appropriate deference. The deference that is due is an acknowledgment of the trial court's extensive knowledge of the facts and that court's direct familiarity with the circumstances of the offender. The Court of Appeals is to conduct the thorough review required by MCL 769.34(11), honoring the prohibition against departures not grounded in a substantial and compelling reason. MCL 769.34(3). In doing so, however, the Court must proceed with a caution grounded in the inherent limitations of the appellate perspective. [*Babcock, supra* at 270.]

“In determining whether a sufficient basis exists to justify a departure, the principle of proportionality—that is, whether the sentence is proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record—defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed.” *Id.*, at 262.

Here, defendant's Sentencing Information Report (SIR) for his offense provided for a minimum sentencing guidelines range of 27 to 45 months. At sentencing, defendant objected to the calculation of the guidelines arguing that there was no evidence the victim suffered any physical or psychological injury. Defendant also argued that there was no exploitation of a vulnerable victim. It was defendant's position that, properly calculated, his guidelines range should be 21 to 35 months. Without scoring defendant's guidelines on the record or addressing defendant's objections to his guidelines scoring, the trial court found that both the original calculation and defendant's calculation were inappropriate. The trial court then departed from the guidelines and sentenced defendant to 30 to 60 years' imprisonment. In support of the significant upward departure, the trial court stated generally that the guidelines, as applied to this case, trivialized the rights of defendant's guardian, and stated that the case involved more than a kidnapping because it involved physical and sexual abuse of a person who was entirely incapable of protecting himself.

On appeal, we are now charged with addressing defendant's argument that his sentence violates the principle of proportionality. In sum, our first step is to review for clear error the existence or nonexistence of a particular factor used by the trial court. *Babcock, supra* at 265. After reviewing the existence or nonexistence of factors used by the trial court for clear error, we must review de novo whether those factors are objective and verifiable. *Id.* We must also review for abuse of discretion whether the factors used by the trial court were substantial and compelling. *Babcock, supra* at 269. However, unfortunately, the record is wholly insufficient for us to make these determinations and engage in a proper analysis of the issue presented to us on appeal.

The trial court did not score defendant's guidelines on the record, refused to address defendant's objections to his SIR, refused to explicitly enunciate its reasons for upwardly departing from the guidelines range, and articulated only a scant evidentiary basis for the upward

departure allowing us virtually no means to engage in a meaningful review of this issue. Furthermore, the trial court's characterization of defendant's offenses without articulating evidentiary support based on the record before it amounted to merely subjective determinations, which are not objective and verifiable, and cannot be used as substantial and compelling reasons for departing from the sentencing guidelines. *People v Abramski*, 257 Mich App 71, 74, 665 NW2d 501 (2003). Because the trial court did not base defendant's sentence on a substantial and compelling reason to justify departure, it is not within the "permissible principled range of outcomes," and the trial court abused its discretion in sentencing defendant. Resentencing is required.

On remand, we direct the trial court to conduct a resentencing hearing wherein it engages in the following within the fifty-six days:²

1. Properly score defendant's guidelines for his convicted offense on the record. In particular, we caution the trial court that it may not rely on elements already taken into account in determining the guideline range. In this case, the physical injury to the victim and the fact that this case involved the exploitation of a vulnerable person was taken into account in determining the guideline range. If the seriousness of the defendant's conduct and his criminal history have already been taken into account in determining the guidelines range, they cannot be used to justify the trial court's departure, unless the trial court finds that these factors have been given inadequate or disproportionate weight. *Babcock*, *supra* at 258 n 12.
2. Address any and all objections defendant raises to the scoring of his guidelines. In doing so, the trial court must make particularized findings with regard to defense objections for the purpose of properly scoring defendant's guidelines on the record.
3. After completing steps (1) and (2) above, the trial court will have a completed SIR and is required to choose a sentence within the guidelines range, unless it concludes there is a "substantial and compelling" reason for departing from this range. *Babcock*, *supra* at 255-256. If the trial court is of the view that one or more substantial and compelling reasons exist to justify a departure from defendant's guidelines, then it must identify each "objective and verifiable" factor with particularity based on the record evidence. *Id.*, at 257-258. And only then may the trial court depart from the guidelines.
4. If the trial court finds that a departure from defendant's guidelines score is warranted because a sufficient basis exists to justify a departure, when fixing defendant's sentence, it must be mindful of the principle of proportionality and appropriately sentence defendant in light of the "seriousness of [his] conduct" and "in light of his criminal record." *Babcock*, *supra* at 262. Also, the trial court must choose a sentence that falls

² We also direct the trial court that while engaging in this mandatory exercise, it shall not substitute rants, railings, or diatribes targeting the sentencing guideline authors, the Legislature, or this Court, as a substitute for reasoned legal analysis.

within the range of reasonable and principled outcomes as contemplated in *Babcock*, *supra* at 269.

Following the resentencing hearing, we direct the trial court to immediately provide this Court with defendant's newly scored guidelines, a transcript of the resentencing hearing, defendant's judgment of sentence, and any supplemental materials needed to facilitate our review.

Affirmed in part, vacated in part, and remanded for resentencing. We retain jurisdiction.

/s/ Pat M. Donofrio

/s/ William B. Murphy

/s/ Kirsten Frank Kelly

Court of Appeals, State of Michigan

ORDER

People of the State of Michigan v Paul W. Dray

Docket No. 257584

LC No. 00-005117-01

Pat M. Donofrio
Presiding Judge

William B. Murphy

Kirsten Frank Kelly
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 56 days of the Clerk's certification of this order and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, the Court shall conduct a resentencing hearing consistent with this Court's mandatory directives outlined in the opinion. We direct that the trial court immediately provide this Court with defendant's newly scored guidelines, a transcript of the resentencing hearing, defendant's judgment of sentence, and any supplemental materials needed to facilitate this Court's review.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand, defendant's judgment of sentence and any supplemental material needed to facilitate this court's review shall be prepared and filed within 21 days after completion of the proceedings.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

FEB 21 2006

Date

Sandra Schultz Mengel
Chief Clerk